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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-602

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

BANKERS AND SHIPPERS INSURANCE OF NEW YORK,

Petitioner,

v.

CHARLES A. MARSHALL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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49 C.F.R. § 1043.7(e) 2

STATEMENT OF THE CASE

The petitioner generally sets forth the facts of this case. However, several pertinent facts were omitted by petitioners. The following facts were omitted from the petitioner's statement of the case.

On June 30, 1982, the date of the underlying automobile accident, neither respondent Fireman's Fund Insurance Company ("Fireman's Fund") nor its insured, Siegel Transfer, Inc. ("Siegel") had any connection with Drum Transportation, Inc. ("Drum"). On that date, however, petitioner insured Drum pursuant to a certificate of insurance issued in accordance with federal regulations. (Ex. D/J 2, R. 12a-13a).

In late July, 1982, Siegel negotiated a purchase of Drum's Interstate Commerce Commission ("ICC") hauling rights and permits. (R. 2a). Before the August, 1982 consummation of this sale, and perforce, at the time of the motor vehicle accident in question, Siegel had no interest whatsoever in the operation of Drum. (R. 2a).

On July 28, 1982, Siegel's liability insurer, Fireman's Fund, attempted to issue an endorsement to Siegel's policy naming Drum as an additional insured. (R. 2a). On August 4, 1982, over a month after the underlying motor vehicle accident, Fireman's Fund issued a certificate of insurance for Drum in the form required by the ICC. (Ex. D/J 18, R. 16a-17a). Due to a clerical error in the ICC filing (R. 4a), the effective date of the coverage for Drum was listed as February 21, 1982. (R. 17a). In February, 1983, the mistaken ICC filing was discovered and corrected by Fireman's Fund.

Despite the clercial error of Fireman's Fund and the lack of an insurable interest of Siegel, the Circuit Court of Marshall County, West Virginia, held that Fireman's Fund provided primary insurance coverage for Drum. (R. 4a-5a). The court also concluded that petitioner's ICC certificate (Ex. D/J 2, R. 14a-15a) afforded Drum excess insurance coverage. (R. 5a-7a). Each insurer

sought review in the Supreme Court of Appeals of West Virginia. Although petitioner's Petition for Appeal was denied (R. 1a). The Petition of Fireman's Fund was granted by the West Virginia high court on November 20, 1985.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because this coverage dispute could be rendered moot by the action of the West Virginia Supreme Court of Appeals. If Fireman's Fund's appeal succeeds before that tribunal, there would be no replacement coverage within the ambit of 49 C.F.R. § 1043.7(e) and, accordingly, petitioner's coverage would be deemed to continue.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

The petition for a writ of certiorari should be denied because action by the West Virginia Supreme Court of Appeals could render petitioner's claims moot. The pending appeal of Fireman's Fund before the West Virginia Supreme Court of Appeals, arising from the same lower court decision, will review the determination that Fireman's Fund has primary coverage applicable to the motor vehicle accident in question. Fireman's Fund believes that the consideration of the appeal by the West Virginia Supreme Court of Appeals will necessarily involve similar issues of insurance coverage between the parties. If Fireman's Fund succeeds in that appeal, there would be no replacement coverage and petitioner's coverage would necessarily continue in full force and effect. Because the action of the West Virginia highest court could render this case moot, the petition for a writ of certiorari should be denied. At a minimum, this Court should defer its consideration of the petition for a writ of certiorari pending the West Virginia Court's disposition of the Petition for Appeal of Fireman's Fund.

CONCLUSION

Because the issues presented here are still under collateral consideration by the West Virginia Supreme Court of Appeals, Fireman's Fund respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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